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SUPREME COURT, U.S.

No. 82-314

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CARL WHITE, Superintendent, Missouri Training Center for Men, Moberly, Missouri,

Petitioner,

v.

DOUGLAS W. THOMPSON

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas Scott Richardson, Jr.

722 Chestnut-Suite 1210
St. Louis, Missouri 63101
(314) 231-6900

Attorney for Respondent

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COUNTER STATEMENT OF THE CASE

On March 10, 1961, Cape Girardeau, Missouri, police officers were dispatched to a shopping center in that town to investigate an attempted robbery. After briefly stopping at the shopping center they began pursuing a "suspicious" 1955 Oldsmobile, northbound on U.S. Highway 61. The Oldsmobile subsequently pulled over to the edge of the road and one of the two police cars dispatched pulled up behind the Oldsmobile. The other police car drove past the Oldsmobile and made a u-turn and stopped, facing the "suspicious" car.

Officer Donald Crittendon, who was in the patrol car behind the Oldsmobile, approached the driver's side of the Oldsmobile and

engaged in a conversation with the driver. One of Crittendon's partners, auxiliary police officer, Herbert L. Goss, began approaching the passenger side of the automobile. Alighting from the other police car was Officer Shannon Kelley and auxiliary police officer, Robert Ross. The driver of the Oldsmobile, who was later identified as Sammy Aire Tucker, pulled a gun and shot Crittendon, mortally wounding him. It was later revealed that the passenger in the automobile was the Respondent, Douglas Wayne Thompson, and testimony at Respondent's trial by one of the surviving police officers revealed that Thompson alighted from the Oldsmobile and pulled a weapon. The officer, Robert Ross, further testified that he observed two flashes over the passenger side of the vehicle.

Auxiliary officer, Goss, who was on the right side of the Oldsmobile, was shot in the right leg at the knee and he bled to death from the wound. Evidence at trial also showed that Officer Hugo Lang, who was in the car with Crittendon and Goss, fired several shots in the direction of the Respondent. Furthermore, Respondent testified that he did not fire any shots and that Officer Goss was shot accidentally by one of the other police officers.

Respondent and Tucker sped away from the scene of the shooting, but they were later apprehended. Tucker was tried, convicted and executed for the murder of Officer Crittencon. Respondent was tried on a change of venue in Bollinger County, Missouri, for the murder of Officer Goss. Respondent was found guilty and sentenced to die in the Missouri gas chamber. Respondent appealed to the Missouri Supreme Court and his sentence was affirmed. State v. Thompson,

363 S.W.2d 711 (Mo. en banc 1963).

After spending several years on death row and with execution imminent, Respondent's family retained Attorney James Herd of St. Louis, who, at the last minute secured a stay of execution for Respondent and filed a post conviction motion under Missouri Supreme Court Rule 27.26. Respondent was successful with his post conviction motion at the appellate level when, in 1965, the Missouri Supreme Court granted Respondent a new trial because the prosecution failed to advise Respondent's defense of the existence of material evidence. 396 S.W.2d 697 (Mo. en banc 1965).

Respondent's second trial on the charge of murdering Officer Goss was held on a change of venue in Mississippi County, Missouri, in December of 1966. After a trial of four days, the jury found Respondent guilty of murder, and because of Missouri's law at the time, it was the duty of the trial judge to pronounce one of two sentences, life in prison or death in the gas chamber. It is axiomatic at this time to remember that the trial which we are concerned with was actually the second trial on this charge for Respondent. The first trial also resulted in a guilty verdict, however, at that trial Respondent was sentenced to di[illegible] In fact, Respondent's co-defendant in the case was actually ex[illegible]cuted while Respondent was on death row. After collaterally attacking the first conviction, Respondent was granted a new trial which is the trial we are examining. What occurred after the jury verdict, but before sentencing, is now in dispute, however, it is undisputed that the judge pronounced a sentence of life imprisonment and Respondent did not perfect an appeal.

On October 21, 1977, Respondent filed a Petition for Habeas Corpus Relief in the District Court for the Eastern District of Missouri. The Petition was denied without an evidentiary hearing, however, the Eighth Circuit Court of Appeals, in Thompson v. White, 591 F.2d 441 (8th Cir. 1979) reversed and remanded the case for the purpose of holding an evidentiary hearing. It was at this juncture that Respondent was appointed the undersigned attorney.

For the purposes of the Habeas Corpus proceeding it was stipulated between the parties that the jury selection process used in the instant case was a rather bizarre method. The Sheriff of Mississippi County, who at the time was W.S. Simmons, was ordered by the Circuit Judge assigned to the case to summons approximately 72 citizens to compose the voir dire panel. Sheriff Simmons was not ordered to, nor did he, utilize the master jury list which the county had compiled in his selection process. Nor did Sheriff Simmons utilize any form of random selection process; the Sheriff merely chose names of people that he personally knew and that he felt would make good jurors.

The stipulation stated that Sheriff Simmons would have testified that the only criteria he used was that he chose people he thought would answer questions truthfully on voir dire examination and who were at least 21 years of age with no criminal convictions. While selecting these individuals for inclusion in the master jury list, Sheriff Simmons was aware that Respondent was on trial for the murder of a Cape Girardeau police officer.

It is obvious from the transcript of the original trial and the evidence presented on the Petition before the District Court

that the Respondent did not make a contemporaneous Motion to Strike the Jury Panel. Mr. Herd, Respondent's trial counsel, testified at the hearing on the Petition as follows:

> Q: You made no motion to quash the entire jury panel based on any type of unconstitutional jury selection procedure?
>
> A: No sir, because I was unaware there was any basis to do so, in fact. (T-62, July 26, 1980).

The District Court denied Respondent's Petition and Respondent appealed to the United States Court of Appeals for the Eighth Circuit, which reversed and remanded the case with directions to issue a Writ of Habeas Corpus.

REASONS FOR DENYING THE WRIT

The Petitioner, Carl White, in seeking Certiorari by this Court, contends that the Eighth Circuit's Opinion granting Respondent Habeas Corpus Relief, misapplied the cause and prejudice test to be followed when determining whether federal courts should intervene in a state proceeding when the prisoner violated a state procedural rule which bars him relief in the state courts. Alternately, Petitioner argues that even if Respondent is not procedurally barred, there was no constitutional defect attendant to Respondent's trial which warrants relief.

The constitutional defect complained of by Respondent is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution because of the manner of jury selection employed by the State of Missouri at Respondent's trial. For a full understanding of the Eighth Circuit Court of Appeals' Opinion it is important to review prior litigation arising out of the jury selection procedures used in Mississippi County, Missouri, at the time of Respondent's trial. This is also important to explain a confusing line of argument in Appellant's petition when Appellant states that the instant case is a case based on alleged underrepresentation of a distinguishable group in the jury selection process.

Respondent's present appointed counsel was requested by Respondent because the undersigned represented Robert Ross in his successful attack on the Mississippi County, Missouri, jury selection procedures. Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978). The Ross trial was held in 1974, however, the jury panel was drawn from

a master jury list which was compiled in 1966. Therefore, it was initially assumed that the Respondent's trial, which was held in December of 1966 also had a jury selected from the unconstitutionally drawn jury panel. What was discovered, however, was far more insidious and dangerous than the jury selection procedures found unconstitutional in the Ross case.

To clear up another confusing element of Appellant's attack on the Eighth Circuit Court of Appeals' Opinion it is critical that Appellant's original defense to Respondent's Petition for Habeas Corpus relief be examined. For when the Eighth Circuit speaks of Respondent's "grisly choice" they were responding to Appellant's claim that Respondent intentionally waived his right to appeal in state courts and was, therefore, barred from seeking redress in Federal Court.

CAUSES FOR NOT MAKING A CONTEMPORANEOUS OBJECTION

Addressing the contemporaneous objection requirement first, it is important to ask ourselves the rhetorical question of why James Herd did not object to the jury panel at Respondent's trial. Answering this question we can speculate on numerous answers. The year is 1966, and many of the landmark decisions concerning jury selection are years away. Turner v. Fouche, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed.2d 567 (1970); Alexander v. Louisiana, 405 U.S. 625 92 S. Ct. 1221, 31 L. Ed.2d 536 (1972); Castaneda v. Partida, 430 U.S. 482 (1977). In fact, the most famous jury selection case, Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 259 (1965), had just been decided. And, of course, the case that specifically found Mississippi County's jury selection procedure constitutionally

defective, Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978), would not be decided for 12 years. In other words, jury selection challenges were not in vogue.

Even though the trial bar was not sensitive to jury selection techniques they were attuned to prejudice of potential jurors. The instant case was moved on a change of venue from the situs of the crime to another county in an attempt to neutralize the obvious prejudice that would result from the publicity arising out of the killing of a police officer.

Respondent is aware that this Court's recent decision in Engle v. Isaac, ____ U.S.____, 102 S. Ct. 1558, ____L. Ed.2d ____ (1982) holds that failure to make a contemporaneous objection based on the fact that a constitutional principle has not been established yet does not necessarily establish "cause". However, in the instant case, coupled with the absence of appellate decisions relating to discriminatory jury selection, is the fact that trial counsel was misled as to how the voir dire panel was actually selected. Needless to say, James Herd was not aware of the hybrid jury selection used in the instant case.

It is certainly understandable that an attorney would assume that a voir dire panel that presents itself in the court room for the trial of a case would be drawn in compliance with state law. It is ridiculous that an attorney can be faulted for failure to suspect that those charged with the administration of justice in Mississippi County would break the law. In fact, it is evident that Herd assumed that the voir dire panel would be randomly selected from the master jury list since he conferred with local counsel regarding those

people on this jury list. (T-62, July 26, 1980).

Chapter 494 of the Missouri Revised Statutes concerns itself with jury selection and it attempts to provide a random selection technique to be utilized. It is obvious in the instant case that Chapter 494 was not followed. State v. Ross, 530 S.W.2d 457, a Missouri Court of Appeals case which was overturned by Ross v. Wyrick, supra, sanctioned the use of Chapter 494, Selection Techniques in Mississippi County, but in Respondent's case we find that these procedures were not even followed.

Francis v. Henderson, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976) appears to stand for the proposition that federal courts should not upset state appellate requirements that hold that a defendant must object contemporaneously with the ocmplained of error for the error to be preserved on appeal. However, this rule is not to be applied if there is a showing of actual prejudice. The Missouri Rule on this point is that an objection must be timely unless there is "plain error'. 26.20(c) Missouri Rules of Civil Procedure. This rule states:

> Plain error affecting substantial rights may be considered on a Motion for New Trial or on Appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest or miscarriage of justice has resulted therefrom.

And, of course, Federal Rule of Criminal Procedure 52(b) likewise allows federal courts to entertain arguments that were not "preserved" at trial when they affect substantial rights of the

individual. U.S. v. Brown, 508 F.2d 427.

It is obvious that Missouri Courts recognize exception to the Contemporaneous Objection Rule. Furthermore, it is obvious that Respondent suffered actual prejudice. Respondent was the victim of an illegal act when the Circuit Judge and the Mississippi County Sheriff violated the Missouri Statutes on jury selection procedures.

Returning to the question of why Attorney Herd did not object to the jury panel or what was the "cause" of his failure to object, it is obvious that he did not know that an illegal jury selection procedure had been implemented. Furthermore, Herd nor Respondent can be charged with failure to discover this illegal jury selection procedure.

Appellant has relied heavily in its petition on Francis v. Henderson, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 149 (1976), however, this reliance is misdirected because what Francis did was re-emphasize that federal courts have the inherent power to review state court convictions. This Court in Francis stated:

> There can be no question of a Federal District Court's power to entertain an application for a Writ of Habeas Corpus in a case such as this. 28 U.S.C. §2241, §2254. The issue, as in the Davis case, goes rather to the appropriate exercise of that power. This Court has long recognized that in some circumstances considerations of comity and concern for the orderly administration of criminal justice require a Federal Court to forego the exercise of its Habeas Corpus power. see Fay v. Noia, 732 U.S. 391, 425,426; Francis v. Henderson,

supra.

The Supreme Court's holding in Francis, however, does not prevent Federal Court intervention in all cases where the Petition did not make a contemporaneous objection to a constitutional defect. The Francis Court concluded:

> We conclude, therefore, that the Court of Appeals was correct in holding that the rule of Davis v. United States applies with equal force when a Federal Court is asked in a Habeas Corpus proceeding to overturn a State Court conviction because of an allegedly unconstitutional grand jury indictment. In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice. Francis v. Henderson, supra.

The cause-prejudice test for determining if a Writ should issue, even though a state procedural rule was violated, was also discussed in Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed.2d 594 (1977). The Opinion in Wainwright indicates that the Supreme Court was concerned with attorneys "sandbagging" the trial courts. That is, trying their cases and hoping for a not guilty verdict, but if their clients were convicted they then would begin making their constitutional challenges. Therefore, the Supreme Court in Wainwright v. Sykes, Francis and Davis held that for the alleged error to be cognizable in a habeas corpus proceeding the petitioner must show cause and prejudice.

Obviously, there was no "sandbagging" in Respondent's case.

Respondent's attorney did not dream that a challenge to the jury selection process would even be successful; Attorney Herd had never even contemplated a motion to quash a jury panel and, therefore, he could not have been holding back any constitutional challenge for later appellate purposes.

ACTUAL PREJUDICE SUFFERED BY RESPONDENT

It is respectfully argued that the Eighth Circuit Court of Appeals' Opinion clearly falls within this Court's cases which have developed a cause-prejudice rule. The cause-prejudice rule has obviously been established to limit the abuse of Federal Habeas Corpus Petitions while at the same time allowing federal courts to intervene when justice dictates. In the landmark case of Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963) Justice Brennan, writing for the majority of the court, concluded his Opinion as follows:

> It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availablility of the Great Writ of habeas corpus in the Federal Courts for persons in the custody of the State offends no legitimate state interest in the enforcement of criminal justice of procedure. Our policy today swings open no prison gates. Today, as always, few indeed is the number of state prisoners who eventually win their freedom by means of Federal Habeas Corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fairminded person will contend that those who have been deprived of their

liberty without due process of law ought, nevertheless, to languish in prison. Noia, no less than his co-defendants, Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own: But surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced; yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to the ultimate remedy. If the states withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas Corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy.

Turning now to an examination of the actual jury selection used in Respondent's trial, it is hard to envision a more blatant case of jury packing. A law enforcement officer in the county, Sheriff Simmons, chose people he personally knew for inclusion on the voir dire panel. This is the antithesis of random jury selection. Furthermore, the Sheriff was fully aware of the nature of the case when he went out to serve the summonses on the potential jurors and there was nothing to prevent him from "screening" the people to determine if their views would comport with his own views on the case.

Ross v. Wyrick, supra, demonstrated that the "sanctioned" jury

selection method used in Mississippi County was unconstitutional because of an imbalance between the number of blacks in the county and the number of blacks included in the master jury list. Initially, in the preparation of this case it was assumed that this unconstitutional system was used in Respondent's trial. But what was discovered was by far a more insidious and obviously illegal method of jury selection.

In challenging the jury selection plan the burden of proving a prima facia case of constitutional invalidity falls on the challenger; at the outset the plan is presumed to be valid. Tarance v. Florida, 188 U.S. 519 (1903); United States v. Hyde, 448 F. 2d 815, N. 14 (5th Cir. 1971). "The cases reveal three generally accepted methods for establishing a prima facia case; they relate to the three logically important points of all selection systems; the source of names with which the system starts, the process itself, and the results obtained. Vulnerability at any one of these points will be sufficient to support a prima facia case." David Kairy, Juror Selection; the Law, a Mathematical Method of Analysis and a Case Study, 10 Am. Crim. L. Rev. 771,778 (1972).

The first point in the examination is where the names were obatined. The names were obtained through no random method, they were straight from the Sheriff's own head and conscience. He chose only people he was personally acquainted with. This is certainly the most blatant "key man" system of jury selection ever discovered. A key man system is not unconstitutional per se, Carter v. Jury Commissioners, 396 U.S. 320 (1970), however, it is immediately suspect. In the Eighth Circuit case of Sanford v. Hutto, 394 F.2d

1383 (8th Cir. 1965) the Court was disturbed by the use of the "key man" system of jury selection. At the District Court level, Judge Henley, who was at that time a District Judge, stated on this point:

> The commissioners could only choose persons with whom they were personally acquainted or persons who had been recommended to them by other responsible citizens ...the result is that a given jury selected by these commissioners is only an extension of the commissioners' personalities ...obviously, an opportunity to discriminate existed since, if each commissioner chose only persons he knew, then he was aware of the race of each person considered. 394 Fed. Supp. at 1282, 1283.

In Sanford, the District Court also relied on Smith v. Texas, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. (1941) where the Supreme Court observed:

> Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no negroes as well as from those commissioners who know, but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenously, the conviction cannot stand. [Quoted from Murrah v. State of Arkansas, 532 F. 2d 105, 109, 110 (8th Cir. 1976)].

Murrah further stated: "....as long as a 'key man' system prevails, utilizing subjective criteria, any disparity is more suspect and the state carries a heavy burden." 532 F.2d 105, 110.

The second point in attacking a jury selection system is the method in which it is utilized. In the instant case it must be

conceded that the method used by Judge Craig and Sheriff Simmons was highly unusual. It must be remembered that all of the cases discussed have spoken of selection techniques used in compiling a jury panel that is then used as the source to draw names from to compose the voir dire panel for a specific trial. In the instant case, what we have is a "key man" system being used for a particular case. This, of course, is unheard of in modern jurisprudence and is totally unacceptable.

The Sixth Amendment to the United States Constitution is the cornerstone of our jury system and it mandates that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Certainly the Respondent did not have an impartial jury when it was the hand picked jury of the county sheriff.

The third method of attacking a jury selection system is the result. Statistically, Mississippi County, at the time of the 1970 census, had a population of 16,647; of that number, 3,523 or 21.16% were black. The 1966 voter registration list indicated that 8,028 citizens were registered and that 1,557 or 19.04% of those registered were black. The master jury list which should have been used in Respondent's case consisted of 964 individuals and of these only 33 or 3.4% were black, demonstrating an obvious unconstitutional disparity. Ross v. Wyrick, supra.

If we examine the voir dire panel which we might equate with a master jury list in the instant case, it consisted of approximately 72 citizens and it was stipulated that of these 72 people, Sheriff

Simmons chose approximately seven black individuals. Statistically, the seven blacks composed 9.7222% of the voir dire panel, resulting in a disparity of over 10% between the blacks on the voir dire panel and blacks in the general population. Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 73 L. Ed.2d 759 (1965) stands for the proposition that a disparity of over 10% is suspect.

The fact that Respondent is white is of no import. A white individual has standing to complain of a jury system that discriminates against a cognizable class such as blacks. Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972);

A fourth accepted basis for establishing a prima facia case is whether there is a violation of statutory procedures or standards. "Courts quite uniformly require strict compliance with the statutory mandates concerning both selection procedures and substantive standards for selection, holding, explicitly or implicitly, that noncompliance with statutory mandates renders the jury illegal and invalidates its actions". Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pacific Company, 328 U.S. 217 (1946); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971); Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) [Quoted from Jurywork: Systematic Techniques, published by the National Jury Project (1979) p. 87].

Obviously, in the instant case the statutory scheme mandated by Chapter 494 of the Missouri Revised Statutes was completely circumvented and violated. Chapter 494 outlines a detailed plan to attempt to comply with the Sixth Amendment. There must be jury commissioners who select not less than 400 names of qualified in-

dividuals for the master jury list and these individuals must be selected from each township of the county. Provisions further elaborate that the names must be placed in a box and be thoroughly mixed for random selection. §494.240 Mo. R.S.

The illegal technique used by the sheriff did not only result in a vior dire panel which was racially underrepresented but the method more frightfully resulted in a hand picked jury. §494.290 Missouri Revised Statutes vaguely refers to ordering new panels of jurors if there is an extraordinary need. However, it is strongly urged that for the foregoing reasons, Respondent has made a prima facia case of jury selection discrimination. Once the moving party established prima facia case of discrimination, the burden then shifts to the government to overcome this burden. Turner v. Fouche, 396 U.S. 394 (1970); Sims v. Georgia, 389 U.S. 404. It is obvious that the State has not met this burden since they did not present any evidence to refute Respondent's clear indication of an unconstitutional jury selection system in Mississippi County which severely prejudiced Respondent.

CONCLUSION

Petitioner argues that the Eighth Circuit's second Opinion, issued after this Court remanded the instant case for reconsideration in the light of United States v. Frady, ____U.S.____, 102 S. Ct. 1584 ____ L. Ed.2d ____ (1982) is not in comport with this Court's Opinion in Engle v. Isaac, supra. Beyond being erroneous, Petitioner says that the Eighth Circuit's rationale "....smacks of arbitrary and capricious judicial make-believe." Petitioner's petition, p. 22. Furthermore, Petitioner believes that the Eight Circuit has an

"....overactive imagination". Petitioner's petition, p. 20. It appears as if the Petitioner would only be satisfied if this Court would strike the protection of the Writ of Habeas Corpus from the Constitution. Article I, Section Nine.

This Court, in Engle v. Isaac, supra, clearly acknowledged the vitality and importance of Habeas Corpus when it stated that "....today, as in prior centuries, the Writ is a bulwark against convictions that violate fundamental fairness." 102 S. Ct. 1558, 1570. Respondent can imagine no clearer violation of fundamental fairness than when a criminal jury is screened and hand picked by a law enforcement officer. The cause for not objecting to this procedure is clear when neither Respondent nor his trial counsel were aware of this system; in fact, they did not become aware of it for 15 years. The actual prejudice suffered by Respondent is also abundantly clear when the due process and Sixth Amendment violation infected the entire trial from the very outset.

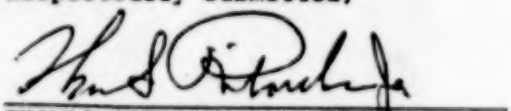
This Court, in Engle v. Isaac, supra, recognized that:

> ....the terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality... In appropriate cases, those principles must yield to the imperative of a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause - and - prejudice standard. 102 S. Ct. 1558, 1575.

It is respectfully submitted that Respondent, Douglas W. Thompson, suffers from a fundamental miscarriage of justice and that he has met the cause - and - prejudice standard. Therefore, for the fore-

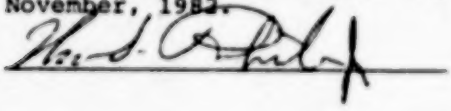
going reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



THOMAS SCOTT RICHARDSON, JR.
Attorney for Respondent
722 Chestnut-Suite 1210
St. Louis, Missouri 63101
231-6900

Two copies of the foregoing brief served upon opposing counsel of record, Michael H. Finkelstein, Assistant Attorney General for the State of Missouri, Broadway State Office Building, 8th Floor, P.O. Box 899, Jefferson City, Missouri 65102, this 12th day of November, 1982.



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MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Respondent, Douglas W. Thompson, by and through his attorney and moves to proceed in forma pauperis, and as grounds therefor, states:

1. That at the time the Respondent filed his original Petition for Habeas Corpus Review in the District Court for the Eastern District of Missouri he was granted leave to proceed in forma pauperis and the undersigned attorney was appointed under the provisions of the Criminal Justice Act.

2. That when the instant case progressed to the United States Court of Appeals for the Eighth Circuit, Respondent was again granted leave to proceed in forma pauperis and the undersigned attorney was again appointed to represent Respondent under the provisions of the Criminal Justice Act.

3. That Respondent has no funds to pay for the expenses of printing his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari and is requeting leave file a typewritten brief.

WHEREFORE, Respondent respectfully moves for leave to proceed in forma pauperis in the above styled case.

Thomas Scott Richardson, Jr.

Subscribed and sworn to before me this 12th day of November, 1982.

Charlotte McAleenan
Notary Public

CHARLOTTE McALEENAN
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 10/13/84
ST. LOUIS COUNTY

Two copies of the foregoing motion were served upon opposing counsel of record, John Ashcroft, Attorney General of Missouri this 12th day of November, 1982.